In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1613

LAM MAN CHUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the hearsay statements of a co-defendant were inadmissible on the substantive count of which he was convicted, because he was acquitted on a conspiracy count and there was no independent evidence that he was a partner in an illegal joint venture with the co-defendant.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment and six years of special parole and was fined $5,000. The court of appeals affirmed without opinion (Pet. App.)

On April 30, 1973, undercover Agents Quarequio and Tripp of the Bureau of Narcotics and Dangerous Drugs contacted Wing Cheung, alias Sang, later named an unindicted co-conspirator, in the Chinatown area of New York City and expressed a desire to buy heroin. Mr. Sang introduced the agents to his boss, co-defendant Juan Pang Chea, who stated that he would have to check with his partner regarding the sale of heroin to the agents (Tr. 19-21, 26-30, 236-244). On May 31, 1973, the agents met with Chea, who told them, *inter alia*, that besides his Chinese partner, about whom he had spoken at their April 30th meeting, he also had a Cuban partner living in Miami with whom he had transacted numerous heroin deals since 1953 (Tr. 30-42 244-256).

On June 14, 1973, the agents again met with Chea, and he told them that petitioner, who frequently gambled at Chea's gambling house and had offered him $3,000 to buy his jade ring, had asked if he could become Chea's partner in Chea's heroin business (Tr. 42-43). Chea also asked if the agents could get heroin back to the United States from England, Holland, Singapore or Hong Kong. He told them that after they bought one kilogram of heroin, he could supply them with 12 to 15 kilograms of heroin per month thereafter (Tr. 44, 257-260). On June 18, 1973, Quarequio met with Chea and was told that Chea's friend (petitioner) had between two and four ounces of heroin for sale at $1,600 per ounce, and that he had more than $300,000 (Tr. 45-47). Chea guaranteed that the heroin was good, stating that he had tried it (Tr. 48-49).[1]

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[1]The June 18, 1973, conversation was tape recorded. There was some dispute over certain passages on the tape, and a transcript reflecting both the government's and petitioner's version was entered into evidence.

On June 25, 1973, the agents met with Chea and were advised that he had an Australian Chinese friend (Wing Piu Lai) who would sell them brown rock heroin in four pound quantities for $13,000 a pound. Chea gave them a sample in a white envelope (Tr. 47-48). Agent Quarequio told Chea he would show the sample to his customer and, if the customer approved, he would place an order with Chea (Tr. 49).

On June 28, 1973, Chea telephoned agent Tripp and arranged a meeting later that day. At the meeting they discussed arrrangements for Tripp to buy a pound of heroin from Chea's Australian Chinese friend. Early the next morning Tripp telephoned Chea and told him they would meet him at 1:00 p.m. (Tr. 265-271). At 1:45 p.m. they met and arranged for a 4:00 p.m. delivery (Tr. 72-76). At approximately 4:30 p.m., co-conspirator Wing Pui Lai, carrying a brown paper bag, and his wife Yuet Lan Lai entered Chea's apartment on Broome Street. A few moments later Chea and Lai, who was still carrying the brown paper bag, emerged from the apartment building, walked to where agent Tripp was waiting in the car, and placed the bag on the front seat. Tripp examined the heroin and signaled to Quarequio, who was waiting in another car, whereupon Quarequio handed Chea $11,000 in a brown vinyl attache case (Tr. 76-78, 276-279, 373-378).

On July 3, 1973, Quarequio telephoned Chea about buying another pound of heroin, but Chea stated that he could not obtain it and, at a meeting later that day, explained that his Australian Chinese friend had left town. During the meeting Chea mentioned that he had been approached by the person (petitioner) whom he had told Quarequio on June 18 was going to supply him with between two and four ounces of heroin. Chea told Quarequio that this person had asked to buy between one and two

pounds of heroin at a price of $16,000 a pound. Chea explained that he was charging the high price because that person had sought to charge Chea the high price of $1,600 an ounce when Chea was attempting to obtain two to four ounces of heroin for Quarequio (Tr. 81-84).

Tripp spoke briefly to Chea on July 10, 1973, about the purchase of more heroin and phoned him the next day and set up a meeting. At 7:30 p.m. they met and arranged for the sale of a pound of heroin. At 8:00 p.m., Tripp telephoned Chea and was told to come right over to Chea's apartment. Shortly thereafter, Tripp entered Chea's apartment and was given a pound of heroin. Tripp and Chea then went to the trunk of Tripp's car, and Tripp gave Chea $13,000 for the heroin (Tr. 292-297, 386-389).

Later that evening, at approximately 10:30, petitioner, empty handed, got out of a taxi cab on Broome Street and went directly into Chea's apartment building. At 11:45 p.m., he came out carrying a shopping bag. He was arrested a short distance from the building and the bag was found to contain a pound of heroin. His address book was also seized and was found to contain Chea's telephone number written in code (Tr. 390-393, 470-477; Gov. Ex. 12).

Chea was arrested the next day in his apartment (Tr. 401-404), and, pursuant to a search warrant, the agents seized his address book, which contained petitioner's telephone number on the first and fifth pages (Tr. 516-520).

1. Petitioner contends that Chea's statements about him to the agents on June 14 and 18 were hearsay and not admissible under the co-conspirator or joint venture exceptions because petitioner was acquitted of the conspiracy charge. The existence of a conspiracy charge is, however, unnecessary to sustain the admission of hearsay so long as there is independent evidence that the defendant and

the declarant were part of a joint venture in crime. *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Williams*, 435 F. 2d 642, 645 (C.A. 9), certiorari denied, 401 U.S. 995; *United States* v. *Branker*, 418 F. 2d 378, 380 (C.A. 2). Even though the trial court directed petitioner's acquittal on the conspiracy count, the court was free to determine that petitioner was a co-venturer with Chea in other illegal narcotics transactions. *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128. See *United States* v. *Zane*, 495 F. 2d 683, 692-693 (C.A. 2).

The evidence here was sufficient to permit the trial judge to find the existence of an ongoing joint criminal enterprise between Chea and petitioner to traffic in heroin. At the time agents seized the pound of heroin from petitioner they also recovered his address book, which contained Chea's phone number written in code.[2] On the following day Chea's address book was seized, and petitioner's phone number was found on the first and fifth pages. The fact that they had each other's phone numbers, combined with the disguised way in which petitioner had recorded Chea's number, supports the inference of a prior ongoing relationship between them for illicit purposes. See *United States* v. *Ruiz*, 477 F. 2d 918 (C.A. 2). That this association was based on heroin dealings predating the July 11 transaction is evident from the substantial size of the July 11 deal. Considering the clandestine nature of the narcotics trade and the excessive caution exercised by those engaged in it, it is not believable that petitioner and

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[2]The first three digits were written normally, but the last four were written in reverse order.

Chea would undertake the transfer of a pound of heroin valued at $13,000, if they had not had prior dealings during which each had assured himself of the other's trustworthiness.

The hearsay statements were made in furtherance of a joint venture. The statement on June 14 that petitioner wanted to become Chea's heroin partner and on June 18 that petitioner was a man of wealth who could supply the agents with 2 to 4 ounces of heroin indicate petitioner's complicity with Chea to supply the agents with heroin and tended to induce the Agents to continue dealing with Chea and petitioner.[3]

2. Petitioner's additional contention—that the hearsay was inadmissible because Chea's June 14 statement incorporating petitioner's statement to him constituted double hearsay and because Chea's June 18 statement did not contain sufficient "indicia of reliability"—are incorrect. So long as the prior conversation between petitioner and Chea comes within an exception to the hearsay rule, the statement of Chea to Quarequio incorporating it is admissible. See *United States* v. *Calarco*, 424 F. 2d 657, 664 n.2 (C.A. 2) opinion of Dooling, J., dissenting on other grounds); Proposed Rules of Evidence for United States Courts and Magistrates, Rule 805; *McCormick, Evidence*, §225, p. 461 (1954 ed.). The implied statement from petitioner to Chea that petitioner wanted to be a partner in Chea's narcotics busi-

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[3] *United States* v. *Cafaro*, 455 F. 2d 323 (C.A. 2), on which petitioner relies (Pet. 11), is inapposite. There the court found a hearsay declaration of an acquitted alleged co-conspirator made in June 1970 to have preceded the conspiracy, but upheld the admission of two other hearsay statements in November and December of 1970, at least the first of which preceded any independent evidence of the joint venture. The court found the admission of the June hearsay declaration harmless error and affirmed the defendant's conviction.

ness was an admission and a declaration of present state of mind, as well as the statement of a co-venturer in furtherance of an illegal venture. It was therefore admissible as part of the subsequent admissible co-venturer declaration by Chea to Quarequio.

Petitioner relies on *United States* v. *Puco*, 476 F. 2d 1099 (C.A. 2), to support his contention that Chea's June 18 statements are not admissible because they do not contain "indicia of reliability." The *Puco* case, which appears to depart from the long accepted co-conspirator exception to the hearsay rule by requiring a finding of "indicia of reliability" in the declaration of a co-conspirator, as well as a finding that it was made in furtherance of the conspiracy, erroneously relied on *Dutton* v. *Evans*, 400 U.S. 74. That case dealt with the constitutionality, under the Confrontation Clause, of a Georgia rule of evidence allowing the admission of co-conspirator declarations made subsequent to the completion of the conspiracy. The Court specifically stated that "we do not question the validity of the coconspirator exception applied in federal courts." *Id.* at 80. It then analyzed the Georgia rule, which went beyond the federal co-conspirator hearsay exception, in terms of the statement's "indicia of reliability" and whether it was "crucial" to the prosecution's case or "devastating" to the defense. Thus, nothing in *Dutton* casts doubt on the federal rule. See *Puco*, *supra*, 476 F. 2d at 1108 (dissenting opinion of Judge Lumbard).

Only two other circuits have considered *Dutton* in relation to the co-conspirator exception to the hearsay rule. In *United States* v. *Adams*, 446 F. 2d 681 (C.A. 9), certiorari denied, 404 U.S. 943, the court appears to have made an analysis similar to that suggested in *Puco*; it upheld the conviction after finding overwhelming evidence of guilt other than the disputed hearsay. However, such reason-

ing has not been followed in subsequent cases, where the court relied on the traditional co-conspirator exception. *E.g.*, *United States* v. *Ellsworth*, 481 F. 2d 864, 870-871 (C.A. 9), certiorari denied, 414 U.S. 1041. In *United States* v. *Weber*, 437 F. 2d 327, 337-340 (C.A. 3), certiorari denied, 402 U.S. 932, the court, after a thorough analysis of the relation between the hearsay rules and the Confrontation Clause, decided that the statements of the co-conspirators were admissible under the traditional exception to the hearsay rule (*Delaney* v. *United States*, 263 U.S. 586, 590). Apparently as a precaution, it also held that the statement had all the traditional hallmarks of reliability, citing *Dutton*. The Third Circuit continues to follow the traditional co-conspirator exception to the hearsay rule. *United States* v. *Van Orden*, 469 F. 2d 461, 464 (C.A. 3). Thus, the Second Circuit's application of *Dutton* to the traditional co-conspirator exception to the hearsay rule is not in accord with *Dutton*, and there is little, if any, support for its analysis in the other circuits.

In any event, the Second Circuit by its affirmance here must have found that the requirements of *Puco* were satisfied. Chea's statements did carry such "indicia of reliability", as they were declarations made with no motive to falsify, made against Chea's penal interest, and in addition, they were also tape recorded. See *United States* v. *Weber*, *supra*, 437 F. 2d at 335-336. Finally their reliability is underscored by petitioner's actions of July 11.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.